SINGAPORE REPORTS

POON SOH HAR & ANOR. v. PUBLIC PROSECUTOR

[C.C.A. (Wee Chong Jin C.J., Choor Singh and D'Cotta JJ.) July 25, 1977]

[Singapore — Criminal Appeal No. 16 of 1976]

Criminal Law & Procedure — Drugs — Charge under Misuse of Drugs Act, 1973 — Heroin found in first appellant's possession — Second appellant had keys to places where heroin was kept — "Trafficking" — Meaning of — Whether both appellants did unlawfully traffic in furtherance of common intention — Misuse of Drugs Act, 1973, ss. 2, 3(a), 6(a), 15(c) & 16(1)(b).

Misuse of Drugs Act, 1973 — Appellants charged and convicted under s. 3(a) of Act — Appeal — "Trafficking distinguished from "(possession of) a drug for the purpose of trafficking".

Evidence — Reference to past criminal acts — Whether admissible — Scope of s. 2 of Misuse of Drugs Act, 1973.

Three male Chinese seen talking to each other on the 10th Floor of Block 156, Mei Ling Street, Singapore were under the observation of the narcotics officers. The latter subsequently waited at the lift entrance on the ground floor of Block 156 and arrested the two appellants when they came out of the lift. The appellants were taken to the Central Narcotics Bureau headquarters where the first appellant was questioned. The first appellant produced from within his underwear a bundle containing 9.08 gms of heroin. He disclosed that he had a few more placed in a letter box at Block 151, Mei Ling Street and referred to the second appellant for the key to the said letterbox. The second appellant produced a bunch of 3 keys, and using one of them, the officer unlocked the letter box in which were found parcels of substance containing 43.3 gms of heroin. Shortly afterwards, the first appellant (in the absence of the second appellant) led the officers to 11-H, Block 151 Mei Ling Street which was opened with one of the 3 keys. The first appellant pulled out a gramophone record from the stack of records and from within its corner took out a packet containing 2.82 gms of heroin. The officers had also found in the room 2 phials with a total heroin content of 0.05 gm. The total heroin content of the exhibits seized was 55.25 gms.

The charge under which the two appellants were jointly tried and convicted reads as follows: "... that you ... at Blocks 151 and 156 Mei Ling Street, Singapore, in furtherance of the common intention of both of you, did traffic in a controlled drug, to wit, 55.25 gms of diamorphine (heroin) and you have thereby committed an offence under section 3(a) of the Misuse of Drugs Act." To bring home the charge, the prosecution tendered evidence of other past criminal acts of the appellants and also invoked some of the presumptions laid down in the Act.

Section 2 of the Misuse of Drugs Act, 1973 reads as follows:

"traffic" means —

(a) to sell, give, administer, transport, send, deliver or distribute; or

(b) to offer to do anything mentioned in paragraph (a) above otherwise than under the authority of this Act or regulations made thereunder and "trafficking" has a corresponding meaning."

Held: (1) the evidence in respect of past criminal activities of the appellants was inadmissible;

(2) the evidence in this case was inadequate to convict the appellants on the charge they were tried;

(3) to possess a drug for the purpose of trafficking is something totally different from the act of "trafficking" as defined in section 2 of the Act;

(4) there was no evidence on which the second appellant could have been convicted of any offence under the Act. As for the first appellant, he was guilty of the offence of having in his possession 55.2 gms of heroin in contravention of section 6(a) of the Act. He was sentenced to 10 years' imprisonment.

Case referred to:-

(1) *Makin* v. *Attorney-General of New South Wales* [1894] A.C. 57.

COURT OF CRIMINAL APPEAL.

Datuk David Marshall for the appellants.

Tan Teow Yeow (Deputy Public Prosecutor) for the respondent.

Choor Singh J. (delivering the judgment of the Court): The two appellants were convicted at a joint trial by the High Court of unlawfully trafficking in 55.25 grams of diamorphine in contravention of section 3(a) of the Misuse of Drugs Act, 1973 and sentenced to death. They now appeal against their conviction and sentence.

The evidence led by the prosecution was as follows: On March 9, 1976 at about 7.20 p.m. a party of officers from the Central Narcotics Bureau (CNB) were at Block 157 Mei Ling Street, Singapore from which place they kept observation on Block 156 Mei Ling Street. The party was led by Acting Senior Narcotics Officer Francis X. Jeyaraje. At about 8.25 p.m. three male Chinese were seen on the 10th floor of Block 156 talking to each other. The narcotics officers immediately went to the lift entrance on the ground floor of Block 156 and waited there. A few minutes later the two appellants came out of the lift. They were arrested by the narcotics officers and taken to the CNB Hq. At the CNB Hq. the first appellant was taken to a room by Jeyaraje while the second appellant was made to sit in the corridor outside the room where he was guarded by a narcotics officer. In the room the first appellant was questioned by Jeyaraje whereupon the first appellant unzipped his trousers and from within his underwear produced a bundle which contained two plastic packets of a brownish substance. The contents of these two packets were later examined and found to weigh 19.5 grams of which 9.08 were diamorphine (heroin) and the rest a mixture of adulterants and contaminates. The first appellant was then asked by Jeyaraje whether he had anymore similar packets. The first appellant replied that he had a few more placed in a letter box at Block 151, Mei Ling Street. Jeyaraje then asked him for the keys to the letter box and was told that they were with the second appellant. Jeyaraje then brought the first appellant to where the second appellant was. The first appellant asked the second appellant for the keys. The second appellant took out from his trousers pocket a bunch of three keys and handed it to the first appellant who in turn handed it to Jeyaraje.

A party of CNB officers left with the first appellant for Block 151, Mei Ling Street. There the first appellant led them to an area on the ground floor where there were a number of letter boxes and pointed out the letter box with marking "11-H". With one of the three keys in the bunch given to him by the first appellant, Jeyaraje opened this letter box. In it were found parcels of a substance weighing a total of 95.41 grams which contained in all 43.3 grams of heroin.

Shortly afterwards, the narcotics officers proceeded with the first appellant (in the absence of the second appellant) to a one room Apartment numbered 11-H on the 8th floor of Block 151 Mei Ling Street of

which the tenant was the mother of the second appellant and the second appellant was one of the "authorised occupants". This Apartment was opened with one of the three keys in the bunch handed earlier to Jeyaraje by the first appellant. The first appellant pulled out a gramophone record from the stack of records in this Apartment and from within its cover took out a packet of substance weighing 6.17 grams which contained 2.82 grams of heroin.

On a search of the room by the narcotics officers, they found two phials on top of the flat surface of a shoe rack containing substances weighing 0.12 grams with a total heroin content of 0.05 grams. The total heroin content of the exhibits seized was 55.25 grams.

The charge on which the two appellants were jointly tried and convicted reads as follows:—

"You,

1. Poon Soh Har
2. Gan Chye Koon

are charged that you, on or about the 9th day of March 1976 at about 8.35 p.m. at Blocks 151 and 156 Mei Ling Street, Singapore, in furtherance of the common intention of both of you, did traffic in a controlled drug, to wit, 55.25 grams of diamorphine and you have thereby committed an offence under section 3(a) of the Misuse of Drugs Act."

The material ingredients of this charge are that on March 9, 1976 the two appellants:—

(a) at about 8.35 a.m.
(b) at Blocks 151 and 156, Mei Ling Street
(c) in furtherance of a common intention
(d) did unlawfully traffic
(e) in 55.25 grams of diamorphine.

The expression "traffic" is defined in section 2 of the Misuse of Drugs Act as follows:—

"'traffic' means —

(a) to sell, give, administer, transport, send, deliver or distribute; or

(b) to offer to do anything mentioned in paragraph (a) above otherwise than under the authority of this Act or regulations made thereunder; and 'trafficking' has a corresponding meaning."

It is clear that on the facts already set out, there was no evidence at all of the appellants or either of them, in furtherance of their common intention, having done, on the day and at the time stated in the charge, any act in relation to or concerning the 55.25 grams of diamorphine seized which fell within the definition of "traffic" laid down in section 2 of the Act. To bring home the charge, the prosecution therefore tendered evidence of other past criminal acts of the two appellants and also invoked some of the presumptions laid down in the Act. This further evidence and the presumptions that were invoked and utilised must now be examined.

The prosecution led evidence which showed:—

(a) that on March 4, 1976 the two appellants together with one Lilian Tan and Lim Ah Geok had smoked heroin in the Apartment No. 11-H, Block 151;

(b) that on March 7, 1976 the second appellant had sold a quarter phial of heroin to Lim Ah Geok for $6.50;

(c) that on March 9, 1976 at 2.30 a.m. Lim Ah Geok, Lilian Tan and the two appellants smoked heroin in the Apartment No. 11-H, Block 151;

(d) that on March 9, 1976 one Tan Lye Seng had come to No. 11-H, Block 151 to purchase heroin from either of the two appellants;

(e) that Tan Lye Seng had on one other occasion a few weeks earlier purchased heroin from the two appellants;

(f) that on March 7, 1976 one George Low was recruited by the two appellants to be a distributor of heroin for them and that on that day the first appellant in the presence of the second appellant gave him ten straws packed with heroin;

(g) that on March 8, 1976 the first appellant gave George Low another ten heroin-filled straws for distribution; and

(h) that on March 9, 1976 the two appellants went to George Low's Apartment where they gave him another twenty heroin-filled straws for distribution.

No objection appears to have been taken by counsel for the defence to the admission of this massive prejudicial evidence and it was not only admitted by the trial judges but also believed and acted upon for they made the following finding:—

"Apart from the presumptions that had been raised against both accused there was also the evidence of Lim Ah Geok, Tan Lye Seng and George Low which proved that the two accused had earlier sold, given, delivered or distributed heroin."

In our judgment the evidence in respect of past criminal activities of the appellants was inadmissible. It offended against the principle laid down in *Makin* v. *Attorney-General of New South Wales*,[1] in that first, it plainly tended to show that the appellants had been guilty of criminal acts other than that with which they were charged, for the purpose of leading to the conclusion that they were persons likely from their criminal conduct or character to have committed the offence for which they were being tried, and secondly, it could not be said to be relevant to any issue in the case. Because of the precise definition of "traffic" in section 2 of the Act which is restricted to the commission of a number of specific acts, evidence of such past acts was irrelevant as it could not prove the offence of trafficking on the day and time in question. The fact that the appellants had trafficked in heroin in the past did not mean that they were trafficking when arrested. Evidence of trafficking in heroin in the past merely raised the suspicion that they were having the heroin for purposes of trafficking and did not prove that they "did traffic" on the day in question. The admission of evidence of past criminal acts could not be justified on any ground and should have been rejected.

The crucial presumption invoked by the prosecution and utilised by the trial judges to convict the appellants on the charge is that laid down in section 15(c) of the Act which provides as follows:—

"15. Any person who is proved or presumed to have had in his possession more than —

(a) ....
(b) ....
(c) 2 grams of diamorphine (heroin) contained in any controlled drug or
(d) ....

shall, until the contrary is proved, be presumed to have had such controlled drug in his possession for the purpose of trafficking therein."

By invoking this section the trial judges made this finding:—

"... that by section 15 of the Act the two accused were, until the contrary was proved, presumed to have had the heroin the subject matter of the charge in their possession for the purpose of trafficking therein. ..."

And after referring to the evidence of past criminal acts of the appellants and that they "had earlier sold, given, delivered or distributed heroin", the trial judges made the following final finding:—

"The evidence of the prosecution clearly established that the two accused acted harmoniously and closely together in the trafficking of heroin."

It seems to us that the trial judges equated the phrase "have had such controlled drug in his possession for the purposes of trafficking" in section 15 of the Act with the word "traffic". To possess a drug for the purpose of trafficking therein, is, as already pointed out, something totally different from the act of "trafficking" as defined in section 2 of the Act. In our judgment the words of section 15 are clear and unambiguous. If Parliament had intended that the presumption should be that the possessor was trafficking in the drug possessed, it would have used the words "traffic in such controlled drug" instead of the words "have had such controlled drug in his possession for the purpose of trafficking."

In our judgment the evidence in this case was inadequate to convict the appellants on the charge on which they were tried. Counsel for the Public Prosecutor has very correctly conceded that the conviction of the two appellants is wrong in law and that he is unable to support it. Accordingly their conviction under section 3(a) of the Act is quashed and the sentence of death imposed on them is set aside.

It now remains to consider what other offence, if any, had the appellants or either of them committed on the admissible evidence in this case. We propose to consider the evidence against each appellant separately.

In the case of the first appellant there was undisputed evidence that when he was arrested as he came out of the lift on the ground floor, he was carrying concealed on his person, 9.08 grams of heroin. He was clearly in possession of it and therefore guilty of an offence under section 6(a) of the Act in respect of 9.08 grams of diamorphine.

The first appellant had admitted to Jeyaraje that he had kept heroin in the box marked 11-H on the ground floor of Block 151, Mei Ling Street. This heroin was found to be in all, 43.4 grams. The first appellant was undoubtedly in possession of this 43.3 grams of heroin and in respect of it he was guilty of the offence of possession of a controlled drug in contravention of section 6(a) of the Act.

The first appellant was also guilty of a similar offence in respect of the 2.82 grams of heroin which he produced to the narcotics officers from within the cover of a gramophone record in the Apartment No. 11-H on the eighth floor of Block 151, Mei Ling Street. The total amount of heroin in respect of which he was guilty under section 6(a) of the Act therefore amounts to 55.2 grams.

The only admissible evidence against the second appellant was that on the day in question he was in possession of a bunch of three keys, one of which fitted the letter box in which was found 43.3 grams of heroin, another fitted the entrance door of the Apartment No. 11-H and the third fitted a cupboard in the Apartment. At his trial the prosecution claimed and the trial judges accepted it as correct that by virtue of the fact that he had a key to the letter box, he was, under section 16(1)(b) of the Act presumed, until the contrary was proved, to be in possession of the heroin found in the letter box. Likewise it was accepted by the trial judges that because one of the keys in the bunch of three keys was a key to the Apartment No. 11-H, the second appellant was, under section 16(1)(c) of the Act presumed to be in possession of the 2.82 grams of heroin found in the cover of the gramophone record.

The relevant parts of section 16(1)(b) and (c) read as follows:—

"16. (1) Any person who is proved to have had in possession or custody or under his control—

(b) the keys of anything containing a controlled drug;

(c) the keys of any place or premises or any part thereof in which a controlled drug is found

shall until the contrary is proved, be presumed to have had such drug in his possession."

There was evidence before the trial court that there were in all two keys to the letter box and two to the entrance door of the Apartment No. 11-H. The second appellant was only one of the four "authorised" occupants of the Apartment and the other three occupants had access both to the letter box and the Apartment with the other relevant keys not in the possession of the second appellant. In our judgment the expression "the keys" in clauses (b) and (c) of section 16(1) of the Act requires strict proof and the presumptions under the said clauses are applicable only if it was first proved that the second appellant had possession of all the relevant keys. On the evidence in this case the said presumptions are inapplicable and it was erroneous for the trial court to hold that the heroin found in the letter box and in the Apartment was in the possession of the second appellant.

It was submitted by counsel for the Public Prosecutor that the first appellant could not have kept the heroin in the letter box without the knowledge and consent of the second appellant and that therefore the provisions of section 16(4) applied. Section 16(4) reads as follows:—

"Where one of two or more persons with the knowledge and consent of the rest has any controlled drug in his possession, it shall be deemed to be in the possession of each and all of them."

There was no evidence before the trial court that the heroin in the letter box was kept by the first appellant with the knowledge and consent of the second appellant and it would be wrong to draw the inference that the second appellant knew and consented to the keeping of the heroin in the letter box from the fact that he had one of the two keys to the letter box because it could have been kept in the letter box by using the other key to the letter box without the knowledge and consent of the second appellant.

Finally, there is the finding of the trial judges "that by section 16(4) of the Act the heroin which was concealed on the person of the first accused was deemed to be in the possession of the second accused." If this finding is correct, the second appellant is guilty of possession of the said 9.08 grams of heroin under section 6(a) of the Act. We have examined the record of the case with care and we cannot find any evidence to support the said finding of the trial judges. There was no evidence before them that the first appellant had the heroin concealed on his person with the knowledge and consent of the second appellant and section 16(4) of the Act was therefore inapplicable.

We find that there was no evidence in this case on which the second appellant could have been convicted of any offence under the act. His appeal is allowed and he is discharged.

For the reasons already given, we convict the first appellant of the offence of possession of 55.2 grams of heroin in contravention of section 6(a) of the Act and sentence him to 10 years' imprisonment.

Order accordingly.

Solicitor: *David Marshall.*

THE "PANGKALAN SUSU/PERMINA 3001"; RASU MARITIMA S.A. v. P.N. PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA & ANOR.

[C.A. (Wee Chong Jin C.J., Chua and Kulasekaram JJ.) July 25, 1977]

[Singapore — Civil Appeal No. 48 of 1976]

Shipping Law — Admiralty Suit in Rem — Charter of vessel to first respondents — Claim for arrears of charter hire — Arrest of ship — High Court (Admiralty Jurisdiction) Act, s. 4(4) — Meaning and scope of "beneficially owned" — Whether the first respondents were the beneficial owners of "Permina 3001" — High Court (Admiralty Jurisdiction) Act, s. 4(4).

Equity — Constructive trust — "Permina 3001" — Conditional sale of "Permina 3001" agreed between first and second respondents — First respondents paid 5 out of 72 equal monthly instalments — Whether second respondents held "Permina 3001" on trust for first respondent.

The appellants chartered the ship "Bruce Ruthi II" to the first respondents who fell into arrears amounting to US$3,929,090.24 for charter hire. The appellants arrested the ship "Permina 3001" on September 20, 1976. The "Permina 3001" at the date when the writ was issued was owned by the second respondents but was under the full control and possession of the first respondents under a previous agreement between one Greenock and the first respondents, the benefit of which had been assigned by Greenock to the second respondents on November 1, 1975.

The first and second respondents sought to set aside the writ and all subsequent proceedings for want of jurisdiction. The first respondents contended that on true construction of section 4(4) of the High Court (Admiralty Jurisdiction) Act (the Act), the "Permina 3001" was not beneficially owned as respects all the shares therein by the first respondents. The appellants contended that the words were wide enough to include the interest of a person who had only full control and possession of the ship arrested. The learned judge ([1977] 1 M.L.J. 141) held that at the date when the action was brought the "Permina 3001" was not beneficially owned as respects all the shares therein by the first respondents within the meaning of section 4(4) of the Act. The appellants appealed against the said judgment. They contended that in equity the first respondents as purchasers were the owners of "Permina 3001" and were entitled to all equitable ownership of the ship.

The issue before the court evolved around the meaning of "beneficially owned as respects all the shares therein" in the context of the Act.

Held, dismissing the appeal: (1) although a person with only full possession and control of a ship, such as a demise charterer, has the *beneficial use* of her, he does not have the beneficial ownership as respects all the shares in the ship and the ship is not "beneficially owned as respects all the shares therein" by him within the meaning of section 4(4) of the Act;

(2) the words "ownership" connotes title, legal or equitable whereas the expression "possession and control", however full and complete, is not related to title.

Cases referred to:-

(1) *The "Permina 108"* [1977] 1 M.L.J. 49.

(2) *The St. Merriel* 1963 P. 247.

(3) *The Andrea Ursula* [1973] 1 Q.B. 265.

COURT OF APPEAL.

Michael Thomas Q.C. and *C. Arul* for the appellants/plaintiffs.

Richard Stone Q.C. and *S. Selvadurai* for Pertamina.

S. Rajkumar for Ozark Shipping Co. S.A.

Wee Chong Jin C.J. (delivering the judgment of the Court): Rasu Maritima S.A., the plaintiffs/appellants, chartered the ship "Bruce Ruthi II" to Pertamina who fell into arrears amounting to US$3,929,090.24 for charterhire. They caused to be issued a writ in rem against the ship "Pangkalan Susu" otherwise known as "Permina 3001", which ship was arrested on September 20, 1976 pursuant to a warrant of arrest.

Pertamina, the first respondent and Ozark Shipping Co. S.A., the second respondent entered conditional appearances and subsequently separately moved the High Court to set aside the writ and all subsequent proceedings for want of jurisdiction. Indus Shipping Co. owns the ship "Bruce Ruthi II", the appellants are the disponent owners and Pertamina are the charterers under a time charterparty. The ship "Permina 3001", at the date when the writ was issued, was owned by Ozark Shipping Co. S.A., but was under the full control and possession of Pertamina under a "Purchase Contract" made on May 9, 1974 between Greenock Shipping Corporation and Pertamina, the benefit of which had been assigned by Greenock Shipping Corporation to Ozark Shipping Co. S.A. on November 1, 1975.

Pertamina's motion was heard before Rajah J. They contended that the court's admiralty jurisdiction cannot be invoked by an action in rem against the ship "Permina 3001" because, on the true construction of section 4(4) of the High Court (Admiralty Jurisdiction Act, the "Permina 3001" must have (and does not have) the same beneficial ownership as the "Bruce Ruthi II". This contention failed because this court in the case of *The "Permina 108"; v. Owners of "Permina 108" v. Martropico Compania Naviera S.A.*[1] rejected it.

Alternatively, Pertamina contended that on the true construction of section 4(4), the "Permina 3001"